

NO.82-1040

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1982

**ARVIS E. WHITMAN, SHERIFF
BIENVILLE PARISH, LOUISIANA,**

PLAINTIFF-APPELLEE

V.

NORTH RIVER INSURANCE COMPANY,

DEFENDANT-APPELLANT

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

**CHARLES L. MAYER
Mayer, Smith & Roberts
1700 Buckner Square, Suite 240
Shreveport, Louisiana 71101
Telephone: (318) 222-2135
Attorneys for Defendant-Appellant**

QUESTION PRESENTED FOR REVIEW

1. Do the terms specifying liability coverage in the policy of insurance, written by appellant, North River Insurance Company, obligate it to pay damages assessed against its insured, Sheriff Arvis E. Whitman, due to an unprovoked assault and battery upon a person in his custody.

LIST OF ALL PARTIES

All parties to this case appear in the caption of the case before the Court. Gray & Company, Inc., although not a party to these proceedings, has an interest in the outcome of this case.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH, LOUISIANA,

PLAINTIFF-APPELLEE

V.

NORTH RIVER INSURANCE COMPANY,

DEFENDANT-APPELLANT

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioner, North River Insurance Company, respectfully prays that a writ of certiorari issue to review the per curiam Opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 15, 1982.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit Court rendered no opinion in affirming the judgment of the trial court. (App. A, *infra*) The Opinion of the United States District Court, Western District of Louisiana, Shreveport, Division, (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 15, 1982. (App. A, *infra*, A-1) This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:1332. Diversity of citizenship; amount in controversy; costs:

(a) The District Courts shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of \$10,000.00, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or a subject of a foreign state;

(3) citizens of different states and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff

or counter-claim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445

STATEMENT OF THE CASE

The incident giving rise to this lawsuit is most succinctly stated by a quotation from a per curiam Opinion rendered by the United States Court of Appeals for the Fifth Circuit:

"In this case, tried to the District Judge without

the intervention of a jury, Reverend Mack Ford was awarded damages against the Sheriff of Bienville Parish, Louisiana, in the sum of \$4,000.00 for a physical assault committed by the Sheriff upon Ford in the Sheriff's Office on December 19, 1975. The undisputed evidence established that the Sheriff had caused Ford to be called back to the Sheriff's Office in the Courthouse, after hours, to furnish new bail in a case pending against Ford. He was called into the Sheriff's Office, where the Sheriff questioned Ford about some scandalous remarks which Ford had allegedly made about him and then struck him about the face and head at least three times."

Per Curiam Opinion of Coleman, Fay and Rubin, Circuit Judges in "Mack W. Ford v. Arvis E. Whitman, Sheriff, Bienville Parish", #77-3510 and #79,1006, United States Court of Appeals for the Fifth Circuit, dated August 14, 1979.

On September 3, 1980, Sheriff Arvis E. Whitman filed suit on the docket of the Second Judicial District Court, Parish of Bienville, State of Louisiana, against four insurance companies for the sum of \$18,543.75, allegedly the amount of his damages resulting from a judgment rendered against him for the assault and battery on the person of Reverend Mack W. Ford. Of this amount, it was alleged that \$7,843.75 was required to pay off the judgment in favor of Mack W. Ford and the balance was allegedly court costs for an appeal to the United States Court of Appeals for the Fifth Circuit and to the United States Supreme Court, together with attorney's fees in the amount of \$10,000.00.

The aforesaid suit was removed by the defendant to the United States District Court, Western District of Louisiana, Shreveport Division, based upon 28 U.S.C. 1332(a)(1) and (c). After removal, the insurers filed a motion to dismiss on the grounds of *res judicata*. Sheriff Whitman filed a motion to oppose the motion to dismiss on grounds of *res judicata* and attached a copy of the certificate of insurance issued to him. Sheriff Whitman sought indemnity from these companies under the following provisions of his policy:

"Coverage C—Personal Injury—'Personal injury' means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, deprivation of rights (as further defined herein), violation of property rights *and, if committed while making or attempting to make an arrest or while resisting an overt attempt of escape by a person under arrest, assault and battery*, provided that no act shall be deemed to be or result in any personal injury unless committed or alleged to have been committed during the currency of this policy arising out of the performance of the duties under color of law of any duly elected or appointed office of Sheriff or deputy sheriff of any parish of the State of Louisiana is stipulated herein;

'Deprivation of rights' means only acts committed under color of any statute, ordinance, regulation, custom, or usage, of any state or political subdivision, which subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States of America."

While the motion to dismiss was pending, Sheriff Whitman filed an amended complaint and substituted appellant, North River Insurance Company, in the place of the other insurers, and this complaint was allowed by order signed November 5, 1981. (App. C, *infra*, A-11) The motion to dismiss on the basis of *res judicata* was declared moot.

North River Insurance Company filed an answer and admitted that it did have a policy covering Arvis E. Whitman but denied that this policy extended coverage to Sheriff Whitman for the damages he allegedly sustained as a result of the judgment rendered against him for the assault and battery on Reverend Mack W. Ford.

On January 8, 1982, Sheriff Whitman filed a motion for summary judgment and attached copies of the complaints, the answer, a memorandum ruling in the suit of "Mack W. Ford v. Arvis E. Whitman", Civil Action #76-1210, United States District Court, Western District of Louisiana, Shreveport Division, a copy of the policy of insurance and an affidavit concerning damages. Defendant-appellant filed an opposition to the motion for summary judgment and the matter was heard in the United States District Court, Western District of Louisiana, Shreveport Division, before the Honorable Tom Stagg, Judge of said Court, on March 1, 1982. The Court sustained Sheriff Whitman's motion for summary judgment and on March 11, 1982, the Trial Judge entered a judgment in favor of Arvis E. Whitman and against North River Insurance Company in the amount of \$18,543.75. (App. B, *infra*, A-2)

North River Insurance Company thereafter perfected an appeal to the United States Court of Appeals for the Fifth Circuit before Circuit Judges Rubin, Johnson and Williams. In a per curiam Opinion rendered without oral or written reasons on October 15, 1982, they affirmed the ruling of the lower Court. It is from this judgment that defendant-appellant, North River Insurance Company, has prosecuted an appeal to this Court.

REASONS FOR GRANTING THE WRIT

The result of this case, if not reversed, will give Courts at the Federal and State level, the right to re-write clear and unambiguous insurance policy provisions so that they will cover situations not contemplated by the parties when the contract of insurance was initially agreed upon. By purposely misconstruing the clear meaning of the policy provisions, the Court below holds, that a law enforcement official, merely upon a showing of being insured, may enjoy financial immunity from tort damages resulting from an unprovoked assault and battery on a person of another in his custody.

A contract of insurance, like any other agreement, is the law between the parties. *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company*, (5 Cir., 1976), 533 F.2d 290; *Article 1901, Louisiana Civil Code*; *Sumrall v. Aetna Casualty and Surety Company*, (La. App. 2nd Cir., 1960) 124 So2d 168; *Schmieder v. State Farm Fire and Casualty Company*, (La. App. 1st Cir., 1976)

339 So2d 390, writ refused 341 So2d 895 (1977).

The lower Courts should have given legal effect to the provisions of the North River Insurance Company policy according to the true intent of the parties, which is determined by the wording of the policy when its provisions are clear and unambiguous. *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company*, Supra; *Bunch v. Frezier*, (La. App. 1st Cir., 1970) 239 So2d 680; *Schmieder v. State Farm Fire and Casualty Company*, Supra.

It is well established in Louisiana that an insurer may limit its liability and, in the absence of ambiguity or conflict with a statute or public policy, this limitation must be given effect. *Muse v. Metropolitan Life Insurance Company*, 193 La. 605, 192 So. 72 (1939); *Cormack v. Prudential Insurance Company of America*, 259 so2d 340, (La. App., 4th Cir., 1972), writ refused 261 La. 824, 261 So2d 230 (1972).

Although ambiguities in the language of an insurance policy are to be resolved against the insurer as the author of the policy, Courts ought not to strain to find such ambiguities, if, in so doing, they defeat probable intentions of the parties even when the result is an apparently harsh consequence to the insured. *Arcement v. Norman Industries, Inc.*, (5th Cir., 1981), 652 F.2d 395; *Calcasieu Marine National Bank, et al v. American Employers' Insurance Company*, Supra.

It is not the task of the Courts to reform or re-write insurance policies on the notion that under all circumstances, irrespective of plain policy provisions, the insured is entitled to indemnity. *St. Paul Fire & Marine Insurance Company v. Vest Transportation*, (5th Cir., 1982), 666 F.2d 932.

Keeping in mind the rules of Louisiana insurance law quoted hereinabove, let us closely examine the contract between the parties, to-wit: North River Insurance Company and Sheriff Whitman (App. D, *infra*, A-14). We see in Section I the usual language which is substantially reproduced in all liability insurance contracts. In essence, it states that the company will pay on behalf of the insured all sums which he becomes obligated to pay as damages "to which this policy applies" and because of, as provided under Coverage C, a personal injury as defined therein. It states that "personal injury" means, for example, "false arrest". In other words, if a person is falsely arrested, it could be seriously argued that damages which he may have suffered would not necessarily mean injury to the person or personal injury in the general sense of the word. However, in this policy under consideration, personal injury is specifically defined to include the tort of false arrest. The same is true of erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character and deprivation of rights, as further defined. *The policy goes on to state that it covers assault and battery, but it qualifies assault and battery by stating that "personal injury" means assault and battery if committed*

while making or attempting to make an arrest or while resisting an overt attempt to escape by a person under arrest.

We submit there is no ambiguity to this provision of the policy, and the intent is obvious. If during an arrest or during an attempted escape by a person under arrest, it is necessary to physically assault the person, then there should be coverage, and the policy so provides; but there should not be coverage in an instance such as occurred when Sheriff Whitman assaulted Reverend Mack W. Ford. Reverend Ford was not being arrested nor was he attempting to escape. He had been summoned to the Bienville Parish Courthouse in connection with the posting of an appearance bond and, while there, was called into the Sheriff's office, where the Sheriff at first verbally reprimanded him for calling the Sheriff a bad name during a previous election and then hit him about the face three times. These actions had nothing whatsoever to do with the duties of Sheriff Whitman as the Sheriff of Bienville Parish.

It is almost beyond comprehension how the lower Court could hold that Sheriff Whitman had coverage under the policy due to the "deprivation of rights" coverage, which was extended in the same sentence that specifically qualified coverage for "assault and battery" as limited therein. We submit that deprivation of rights would include countless things, such as depriving a prisoner of sanitary living conditions, the right to worship, proper

medical care or access to a legal library. Sheriff Whitman did not deprive Mack W. Ford of his rights within the intendment of the insuring contract.

It must be kept foremost in mind that the legal issue before the Court is not a question of the construction and/or interpretation of 42 U.S.C.A. § 1983. §1983 is rightfully given a liberal construction inasmuch as it is remedial legislation. Basista v. Weir, (CA 3), 340 F.2d 74.

We are not here attempting to evaluate the conduct of Sheriff Whitman to see if it actually gave Reverend Ford a §1983 action. We are here today construing an insurance contract, which is a question of Louisiana law.

The Louisiana authorities cited hereinabove clearly and without question give North River Insurance Company the right to restrict its contract of insurance coverage so long as it is not contrary to public policy or is in conflict with a statute. The Louisiana Courts mandate that the construction of an insurance contract *must* take into consideration the intent of the parties.

If it had been within the intendment of the parties to insure Sheriff Whitman against damages resulting from the commission of the act in question, why would it have been necessary to even mention assault and battery in the contract of insurance? If deprivation of rights covers everything done by a Sheriff in his capacity as such, then why go the trouble of spelling out numerous things that

are included within "personal injury"? If Sheriff Whitman was to be insured against liability for the act committed, then why could not North River Insurance Company merely have stated "personal injury means damages resulting from anything done by the Sheriff in his capacity as such".

In the U.S. District Court and the Court of Appeals below, plaintiff cited *Thomas v. Appalachian Insurance Company*, 335 So2d 789. This case has absolutely no applicability to the case at bar.

In the *Thomas* case, Chester L. Parson filed suit against State Trooper Dick Thomas and alleged that Thomas "knowingly, intentionally, and maliciously" used unnecessary and unreasonable force in unlawfully arresting plaintiff for driving while intoxicated and driving with a suspended license. Appalachian Insurance Company, the general liability insurer for the State Trooper, took the position that, among other things, they did not owe a defense because intentional acts were excluded by the language of the policy. The Court examined the Appalachian policy and, at 315 So2d 791, quoted the usual insuring language whereby the insurer agreed to pay on behalf of the insured sums he would be required to pay as damages "because of...bodily injury...caused by an occurrence and arising out of operations in performance of official duties". Appalachian took the position that the incident involving Chestser L. Parson was not an "occurrence" as used in Coverages A and B because it was not an

accident but an intentional act. The Trial Judge, in dismissing the suit for a declaratory judgment filed by Thomas, held that the allegations of the petition indicated that the alleged acts were intentional and that would not constitute an occurrence within the definition of the policy and there was no coverage.

The Court of Appeal disagreed and relied on Coverage C, which was not mentioned by the Trial Judge. The Court of Appeal cited certain language from the Appalachian policy as follows:

"Subject to the terms, conditions and limitations hereinafter mentioned, [Appalachian agrees] to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of claims for *false arrest, assault and battery...or other claims growing out of the performance of the duties of law enforcement officers or their employees*, during the currency (sic) period of this policy." (Emphasis by the Court)

THE LANGUAGE OF THE APPALACHIAN POLICY IS DIFFERENT THAN THE POLICY UNDER CONSIDERATION!!

The Court of Appeal then held that plaintiff's claim is one growing out of the performance of duties as a law enforcement officer. This language is entirely different. The facts of the *Thomas* case are different. In the *Appalachian* case, the policy clearly encompassed assault and battery, as well as any claim arising out of the performance of the

duties of a law enforcement officer. The assault and battery coverage *was not limited* to any extent whatsoever, while the assault and battery coverage in the instant case is definitely limited, as mentioned hereinabove.

To compare the facts and the policy language in the *Thomas v. Appalachian Insurance Company* case to the instant case is, we respectfully submit, the same as comparing oranges to apples. They are just not the same. The two cases are admittedly somewhat similar, but the *Thomas* case is not and should not be a basis for a ruling in favor of Sheriff Whitman on the question of coverage before the Court.

CONCLUSION

The failure of the Court of Appeals below to reverse the judgment wherein the District Court in effect re-wrote the policy of Insurance issued to Sheriff Whitman contravenes well established Louisiana doctrine concerning the interpretation of insurance policies. We respectfully submit that the Trial Court and the Appellate Court were in error and therefore request that a writ of certiorari should be granted.

Respectfully submitted,
MAYER, SMITH & ROBERTS

By _____
Charles L. Mayer
1700 Buckner Square, Suite 240
Shreveport, Louisiana 71101

A-1

APPENDIX "A"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**No. 82-3200
Summary Calendar**

**ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH, LOUISIANA**

Plaintiff-Appellee,

VERSUS

NORTH RIVER INSURANCE COMPANY

Defendant-Appellant.

**Appeal From the United States District Court
For the Western District of Louisiana**

(October 15, 1982)

**Before RUBIN, JOHNSON and WILLIAMS, Circuit
Judges.**

PER CURIAM: AFFIRMED. See Local Rule 21.

APPENDIX "B"

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

ARVIS E. WHITMAN

versus

CIVIL ACTION NO. 80-1453

NORTH RIVER INSURANCE COMPANY

JUDGMENT

For the reasons orally assigned in open court on
March 1, 1982,

IT IS ORDERED, ADJUDGED AND DECREED
that there be summary judgment in favor of the plaintiff,
Arvis E. Whitman, and against the defendant, North River
Insurance Company, in the amount of \$18,543.75 plus legal
interest as provided by law and court costs.

THUS DONE AND SIGNED in chambers at
Shreveport, Louisiana, this 11th day of March, 1982.

/S/TOM STAGG

TOM STAGG
UNITED STATES DISTRICT JUDGE

A-3

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

ARVIS E. WHITMAN,

Plaintiff

-versus-

CIVIL ACTION NO. CI801453

NORTH RIVER INSURANCE CO., ET AL

Defendant

**TRIAL COURT: HONORABLE TOM STAGG,
JUDGE**

**TRANSCRIPT: REPORTER'S OFFICIAL TRAN-
SCRIPT OF PROCEEDINGS IN ABOVE CAUSE**

**LOCATION: UNITED STATES DISTRICT COUR-
THOUSE, SHREVEPORT, LOUISIANA**

HEARING DATE: MARCH 1, 1982

TRANSCRIPT FILED: 3/9/82

**TRANSCRIPT ORDERED BY: MR. ALEX F.
SMITH, JR., ATTORNEY SHREVEPORT, LOUISIANA**

**BILL HOGAN, RPR
Official Court Reporter
United States District Court
P.O. Box 441
Shreveport, La. 71162
(318) 226-5293**

APPEARANCES:

FOR THE DEFENDANTS: Mr. Alex F. Smith, Jr.
Attorney at Law
307 Wall Street
Shreveport, La. 71101

BE IT REMEMBERED that in the United States District Court for the Western District of Louisiana, Shreveport Division, in the United States Courthouse, in the City of Shreveport, Parish of Caddo, State of Louisiana, on the 1st day of March, 1982, the above entitled cause came on for hearing before the Honorable Tom Stagg, Judge of said Court, and the proceedings on the hearing are in the words and figures following, to-wit:

THE COURT: The next matter in order of their number is Arvis Whitman versus North River Insurance Company; and there is before the Court a summary judgment motion filed by the plaintiff, Arvis Whitman.

This case goes back a long way with me. I think to 1975. I believe it was in 1975. It was at the time they were having a sheriff's race in Bienville Parish, and a man named Reverend McFord ran a children's home in Bienville Parish. And he thought that the sheriff of Bienville Parish was a terrible man, an awful candidate. He said so publicly and gave terrible reasons why using perfectly awful language. He put a sign in front of his home—"This time, I think, elect a Christian sheriff so and so". To which Arvis Whitman took considerable umbrage.

Some event occurred on the—I forget the days;

but I think it was on the nineteenth of the month that it occurred, which was a Tuesday or Wednesday. Some shots were fired and some reason or other, the sheriff's deputies came to get McFord and took him to the sheriff's office and charged him with disturbing the peace or something, and a bond was set by the state judge; which was posted, and McFord went about his business.

When Arvis Whitman who was the sheriff of Bienville Parish found out that McFord had been in the hands of his deputies and out again, my recollection is that he called up the state court judge and remonstrated with him about the of the bond. The state court judge condescended for his friend, the sheriff, to raise the bond. So a deputy was told to call McFord—and by now it was Sunday, or about then, four or five days later.

He was called to come to the sheriff's office, to the courthouse, and arrange to make a bigger bond. When he got there, my recollection is, he was told to go into the sheriff's office. And the sheriff was in there with a man named Talbort, and they asked Reverend McFord if it was true that he had said that Talbort reported to the sheriff that he, McFord, has called the sheriff a "war monger" and had used some other abusive language; whereupon getting no adequate response from McFord, the sheriff—according to my account—either hit him or kicked him a total of four times, resulting in a judgment of one thousand dollars per lick against the sheriff for deprivation of the rights of Reverend McFord.

Well, that was a long time ago and a lot of Court action since then. Our trial was in November of seventy-seven. There was an appeal to the Fifth Circuit, and all this time Arvis Whit-

man is trying to get his insurance company or companies to defend him. They're using whatever force of law they thought they had. They wouldn't pay him and they wouldn't pay his lawyer the legal fees he was out. They wouldn't defend him.

He makes a motion, after filing suit in this Court, against the North River Insurance Company. He then follows on with a motion for summary judgment based on the language in the insurance policy. And comparing it with the language used by this Court in ruling on a motion for summary judgment that had been filed back in the original case of McFord versus Whitman in 76-1210; and he now uses the language from Case Number 76-1210 to claim coverage and payment from his insurance company.

That insurance policy provides coverage for damages arising from deprivation of rights. The policy also covers damages for assault and battery, provided the assault and battery was committed while attempting to make an arrest or while resisting an attempt by a prisoner to escape. I believe that's not word for word, but it's close.

The company denies any coverage on the basis that what Sheriff Whitman did was to commit an assault and battery on McFord, and that it was not committed during an arrest and that, therefore, the policy language doesn't apply.

The opposite side of that argument is Sheriff Whitman says that the language used by this Court in a ruling denying a summary judgment wherein in plain words, the Court said Sheriff Whitman had violated the rights of citizens. The Sheriff had said he's sworn to do this or that, and

the language that I used was: "I am sworn in my duty to protect against deprivation of rights granted to citizens under the constitution."

So here we have the use of the words, "deprivation of rights"; and it's on this language that the defendant, North River, admits those words were used but contends that the Court was in error and should reconsider characterization being administered to McFord as the deprivation of rights, rather than assault and battery.

They argue that the phrase, "Deprivation of rights" encompasses such things as depriving a prisoner of sanitary living conditions, depriving someone of proper medical care while in custody, depriving the right to worship; those manners of things are correctly described as deprivation of rights.

They make another argument that if assault and battery was committed, they claim, on McFord by Arvis Whitman. If assault and battery is considered a deprivation of rights, why was assault and battery specifically mentioned and set out in the policy with clarification.

When you read the policy, it appears that assault and battery was mentioned in the context, I suppose, of a state court civil action against the sheriff for the intentional tort of assault and battery.

The phrase, "Deprivation of rights", seems to me to encompass claims brought under 1983, or any other civil rights statutes. And while assault and battery would fit under both categories of policy language, I don't think the policy intends to exclude it from deprivation rights.

Among the more well-settled principles in Louisiana law is that the insurer is required to express exclusions to its insuring obligations. To clearly express the exclusions, and that any doubt or ambiguity is to be resolved against the insurer.

In the Benton Casing Service Company there's an added phrase to that well-settled principle, and that is that it also is to be resolved in favor of what reason and probability dictate was intended by the parties with respect to coverage. That's what takes the longest time to decide. What did that mean, and how do we apply it here?

In the Fifth Circuit in McDaniels versus A&P Grocery Company, somewhere in six or two Federal second, that court said that any doubt as to the meaning of a disputed policy provision must be resolved against the insurer. Here, the ambiguity between the use of the words, "deprivation of rights" and the words, "assault and battery" must be resolved against the insurance company to the extent that where there is an assault and battery which rises to the level of a constitutional violation and becomes a deprivation of rights under the circumstances of McFord's confrontation with Sheriff Whitman seven years ago. I think it was that long ago. Then it falls within the coverage of the policy using the words, "deprivation of rights".

This court found that a deprivation of rights had occurred. It occurred in the form of an assault and battery against Mr. McFord. But there is that level of ambiguity that exists here that I think clearly Louisiana precedent and Fifth Circuit precedent do require this Court to resolve it in favor of granting the summary judgment for Sheriff Arvis Whitman; and summary judgment

is, for the reasons stated, granted in this case.

Now, Mr. Smith, if that concludes your business with the Court, you're free to move around.

MR. SMITH: Thank you, sir.

THE COURT: I presume that if you think seriously enough about the Court's rendition this afternoon that you think I have erred to an intolerable degree, I would specifically request that you ask Fifth Circuit to grade my paper.

MR. SMITH: I think they'll get that chance

THE COURT: There is no question but what that it is a closely disputed issue, that it is the total opposite result, unguidedly, that I might reach. But I am guided by the Fifth Circuit precedents.

It seems like what I did in the trial in November of seventy-seven was to award damages in favor of McFord because I thought he was impermissably beat about the head and body. And that it was neat and proper that the sheriff out to pay those damages.

Now, what I'm called on to do almost five years later—four and a half years later—is to rule that under his insurance policy, the sheriff gets to be paid by his insuror. It doesn't come to the Court clean and slick and smooth and without question. And I have labored over it, and I have decided it, and let someone else figure out whether I did it right.

MR. SMITH: All right.

THE COURT: All right, gentlemen.

A-10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ARVIS E. WHITMAN,

Plaintiff

-versus-

CIVIL ACTION NO. CI-801453

NORTH RIVER INSURANCE CO.

Defendant

CERTIFICATE OF REPORTER

I, Bill Hogan, do hereby certify that the above and foregoing transcript, consisting of 1 through 11 is a full, true, correct and accurate transcript of the proceedings, as requested to be transcribed, had in the hearing of the above cause on March 1, 1982 before the Honorable Tom Staggs, Judge of said Court, as reported and transcribed by me as Official Court Reporter for the above Court.

/S/ BILL HOGAN

Bill Hogan, Official Court Reporter

APPENDIX "C"

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

**ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH, LOUISIANA**

VERSUS

CIVIL ACTION NO. 80-1453

**STONEWALL INSURANCE COMPANY,
ET AL**

AMENDED COMPLAINT

NOW INTO COURT, through undersigned counsel, comes ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH, LOUISIANA, complainant herein, and with respect shows and avers that he desires to supplement and amend his original petition herein by substituting North River Insurance Company, for the named defendants in the caption, preamble, petition and prayer of the original petition.

That North River Insurance Company, a foreign insurance corporation authorized to do and doing business within the State of Louisiana, should be substituted as a party defendant in lieu of the named defendants.

WHEREFORE, complainant prays that NORTH RIVER INSURANCE COMPANY be substituted as a party defendant in lieu of the original defendants and that after

all legal delays and due proceedings had, there be judgment herein in favor of complainant, ARVIS E. WHITMAN, SHERIFF, BIENVILLE PARISH, LOUISIANA, and against the defendant, NORTH RIVER INSURANCE COMPANY, in the full and true sum of EIGHTEEN THOUSAND, FIVE HUNDRED FORTY-THREE AND 75/100 (\$18,543.75) DOLLARS, together with legal interest from date of judicial demand until paid and for all costs of these proceedings.

Further prays for all necessary orders and decrees and for just and equitable relief.

LAW OFFICES OF BOBBY L. CULPEPPER
525 EAST COURT AVENUE
JONESBORO, LOUISIANA 71251

BY: _____
BOBBY L. CULPEPPER

CERTIFICATE

I hereby certify that a copy of the above and foregoing Amended Complaint has been served upon the defendants by mailing a copy of same, in the United States mail, postage prepaid, to Mr. Alex F. Smith, Jr., Mayer, Smith & Roberts, Attorneys at Law, 307 Wall Street, Shreveport, Louisiana 71101.

Jonesboro, Louisiana, this 2nd day of June, 1981.

BOBBY L. CULPEPPER

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

ARVIS E. WHITMAN, SHERIFF,
BIENVILLE PARISH, LOUISIANA

VERSUS

CIVIL ACTION NO. 80-1453

STONEWALL INSURANCE COMPANY,
ET AL

FILED NOV. 5, 1981

ORDER

Considering the foregoing Amended Complaint:

LET NORTH RIVER INSURANCE COMPANY be and it is hereby substituted as a party defendant in lieu of the original defendants herein.

THUS DONE AND SIGNED in Chambers at Shreveport, Louisiana, on this the 5th day of November, 1981.

U. S. DISTRICT JUDGE

APPENDIX "D"

CERTIFICATE OF INSURANCE

NO. 007

effected through

GRAY & COMPANY, INC.

2612 SEVERN AVENUE

METAIRIE, LOUISIANA 70002

We have effected the following insurance with
STONEWALL INSURANCE COMPANY, INTERNA-
TIONAL SURPLUS INSURANCE COMPANY, DIXIE
AUTO INSURANCE COMPANY AND HOLLAND
AMERICA INSURANCE COMPANY

Assured:
ARVISE. WHITMAN

Premium Adjustable per
Declarations

SHERIFF OF THE PARISH OF BIENVILLE

Address:
PARISH OF BIENVILLE
LOUISIANA

Rate: Adjustable Monthly
At Rates Outlined in
Declarations

Period:
NOVEMBER 1, 1974 TO NOVEMBER 1, 1977
BOTH DAYS AT 12:01 A.M., CENTRAL STANDARD
TIME

Coverage:

EXCESS COMPREHENSIVE GENERAL BODILY IN-
JURY AND/OR PROPERTY DAMAGE LIABILITY

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AND/OR PROFESSIONAL LIABILITY, AS PER
FORMS AND ENDORSEMENTS ATTACHED
HERETO.

Amount or Limit:

\$1,000,000.00 COMBINED SINGLE LIMIT

Signed at New Orleans, Louisiana, this 1st day of
November 1974

GRAY & COMPANY, INC.

By: _____

ENDORSEMENT

SERVICE OF SUIT CLAUSE (U.S.A.)

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

It is further agreed that service of process in such suit may

be made upon

GRAY AND COMPANY, INC.
2612 SEVERN AVENUE
METAIRIE, LOUISIANA 70002

, and that in any suit instituted against any one of them under this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Insured (or Reinsured) to give a written undertaking to the Insured (or Reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Insured (or Reinsured) or any beneficiary hereunder arising out of this contract of insurance (or Reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

GRAY & COMPANY, INC.

By: _____

NAME OF INSURED (ASSURED):

The "NAMED INSURED" shall be defined as follows:

"NAMED INSURED" means each Sheriff of the Parishes of the State of Louisiana, each legally commissioned Deputy Sheriff, and each employee of the Sheriff, each of whom have given formal written notice to the Company or its authorized representative of their notice to the Company or its authorized representative of their intent to be covered hereunder, or each of whom have been included for automatic coverage under Option B or Option C of the Automatic Coverage endorsement attached to this Policy, and for whom premium as stipulated herein has been paid to the Company. Wherever the word "Insured" appears herein, it will be understood to mean the Named Insured.

Notwithstanding anything contained herein to the contrary it is understood and agreed that wherever the word "ACCIDENT" appears in this Policy, the word "INCIDENT" may be substituted.

"Incident" includes the initial act or acts attributable to a specific alledged crime or complaint resulting in action by the insured, which crime or complaint can be fixed as to time and place, and any subsequent acts which directly re-

late to or arise out of the original crime or complaint.

As defined under Coverage A and Coverage B, notwithstanding anything contained herein to the contrary it is understood and agreed that wherever the word "ACCIDENT" appears in this Policy, the word "OCCURRENCE" may be substituted.

The word "Occurrence" whenever used herein shall mean one happening or series of happenings arising out of one event taking place during the period of this policy and resulting in injury to persons or damage to property during the period of this insurance provided such injury or damage is not intentionally caused. All injuries or damage arising out of exposure to substantially the same general conditions shall be considered as arising out of one occurrence.

INCLUSION OF CONTRACTUAL LIABILITY

Such insurance as is afforded by this policy with respect to liability assumed by the Assured under contract applies to all written contracts, provided however the insurance afforded hereunder does not apply to any liability assumed by the Assured under any such contract with respect to any accident caused by the sole negligence of the indemnitee unless specifically scheduled herein.

The Assured agrees to give notice to the Company as soon as reasonably possible after each such contract is entered

into by the Assured with an indemnitee. The Assured further agrees to maintain a record of all such contracts and will pay any appropriate premium therefor.

WHEREAS the Assured has paid Premium or Consideration to the Stonewall Insurance Company (hereinafter referred to as "the Company") to insure against loss as follows:

NOW, THEREFORE, the Company agrees to indemnify (Subject to the terms, conditions and limitations contained herein and/or endorsed hereon or attached hereto, which terms and the due observance of all conditions and limitations shall be deemed to be precedent to the liability of the Company hereunder) the Assured, his Executors, Administrators and Assigns against all sums which the Assured shall become legally liable to pay in respect of claims against the Assured for loss or damage as more specifically defined and set forth herein, occurring during the policy period stated in the Schedule and arising out of the Assured's operations.

INSURING AGREEMENTS

SECTION I

Comprehensive General Liability Insurance

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to

pay as damages to which this Policy applies because of:

COVERAGE A — Bodily Injury

“Bodily Injury” means bodily injury, sickness or disease sustained by any person accidentally caused by any act of the insured while acting within the scope of his duties as a law enforcement officer; or tax collector; “damages” includes damages for death and for care and loss of services resulting from bodily injury;

COVERAGE B — Property Damage

To pay on behalf of the Assured all sums which the Assured shall become legally obligated to pay for damage to tangible property including loss of use thereof caused by accident and arising out of the Assured's operations;

COVERAGE C - Personal Injury

“Personal Injury” means false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, deprivation of rights (as further defined herein), violation of property rights and, if committed while making or attempting to make an arrest or while resisting an overt attempt to escape by a person under arrest, assault and battery, provided that no act shall be deemed to be or result in personal injury unless committed or alleged to have been committed during the currency of this policy arising out of the per-

formance of the duties under color of law of any duly elected or appointed office of sheriff or deputy sheriff of any Parish of the State of Louisiana as stipulated herein;

"Deprivation of Rights" means only acts committed under color of any statute, ordinance, regulation, custom, or usage, of any State or political subdivision, which subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States of America.

The company shall have the right and duty to defend any suit against the insured seeking damages on account of such personal injury or bodily injury, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

COVERAGE:

Including but not limited to:

1. Bodily Injury.
2. Property Damage.
3. Personal Injury.

4. False Arrest.
5. Erroneous Service.
6. False Imprisonment.
7. Malicious Prosecution.
8. Libel.
9. Slander.
10. Defamation of Character.
11. Violation of Property Rights.
12. Assault and Battery.
13. Deprivation of Civil Rights.
14. Wrongful Eviction
15. Invasion of Privacy.
16. Wrongful Entry.
17. Watercraft not to exceed 36 feet unless specifically endorsed.

SECTION I applies only to accidents arising out of operations as are now or may hereafter within the currency of this Policy be conducted by the Assured subject to the exclusions and conditions hereinafter contained.

CONDITIONS

TERRITORIAL LIMITS

This Policy applies only to accidents arising during the policy period within the United States, its territories or possessions, Canada, Gulf of Mexico.

EXCLUSIONS

This policy does not apply:

(a) To any obligation for which the insured or any carrier as his insurer may be held liable under workmen's compensation, unemployment compensation, disability benefits law, or under any similar law, or to personal injury or bodily injury sustained by any paid full and part time law enforcement officer of the names insured directly or indirectly related to his employment by the named insured;

(b) Under Coverages A, B, or C to claims arising out of the ownership, operation, use, loading or unloading of any land motor vehicle designed for use principally on public highways, including any machinery or apparatus attached thereto or any aircraft;

(c) Under Coverage A to bodily injury to any person occurring while such person is in the custody of any municipal, state or federal authority; other than the named insured;

(d) To Property Damage:

(1) Property owned, occupied by or rented to the Assured.

(2) Property used by the Assured or

(3) Property in the care custody and control or to which the Assured is exercising physical control.

(e) Watercraft exceeding 36 feet in length or while being operated for hire.

DECLARATIONS

1. NAME OF ASSURED:

ARVIS E. WHITMAN

SHERIFF OF THE PARISH OF BIENVILLE

2. ADDRESS:

PARISH OF BIENVILLE

LOUISIANA

3. POLICY PERIOD:

NOVEMBER 1, 1974 TO NOVEMBER 1, 1977

**BOTH DAYS AT 12:01 A.M., CENTRAL STANDARD
TIME**

**4. THE ASSURED IS A LAW ENFORCEMENT AND
TAX COLLECTING AUTHORITY**

5. CLASSIFICATION OF OPERATIONS:

CODE CLASSIFICATION

3762 Policement, full time Law Enforcement Officers

**3762-S Regular and Special Deputies Rated as Police
#3762 and assigned a Payroll of \$200.00 per
month, or less, per man, and Police Cadets (to be
rated as 2475)**

**2475 Municipal, Township, County or State
Employees, not otherwise classified, i.e. tax**

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collecting personnel, etc.

6. RATE:

CODE	MONTHLY RATE	ANNUAL RATE
3762	10.5265 per individual	126.3180 per individual
3762-S	2.6528 per individual	31.8336 per individual
2475	2.6528 per individual	31.8336 per individual

7. SERVICE ORGANIZATION:

GRAY & COMPANY, INC.
2612 SEVERN AVENUE
METAIRIE, LOUISIANA 70002

AUTOMATIC COVERAGE ENDORSEMENT

***OPTION A - MONTHLY PAYMENT - COVERAGE FOR
SCHEDULED EMPLOYEES ONLY***

1. New people employed by each individual Sheriff shall be automatically covered under this contract. The premium for such people will be picked up on the next monthly report.
2. Persons leaving the employment of each individual Sheriff shall be automatically dropped from coverage under this contract on the date of termination of employment. The report for such persons will not be included in the next

monthly audit due.

3. No further pro rata of the premiums for such persons being added to or dropped from the individual Sheriff's Schedule of Insured Persons shall be necessary.

4. All persons not originally listed as covered or added to the list of the "Covered Employees" as submitted monthly by the Sheriff will automatically be considered as "Not Covered" or uninsured.

OPTION B - MONTHLY PAYMENT - COVERAGE FOR ALL EMPLOYEES

1. At the request of the Sheriff, as signed below, coverage is to be extended automatically to cover each and every employee of the Sheriff for the full term of the contract.

2. The estimated number of employees, by classification, of the Sheriff will be filed with the Insurance Carrier at the beginning of the contract.

3. A Voluntary Report will be rendered by the Sheriff monthly, giving the number of persons in his employ by classification.

4. At the end of the coverage period, a final audit will be conducted by the Insurance Carrier verifying the correctness of the Voluntary Audits as submitted by the Sheriff.

5. Any addition or return premium shall be paid by the Sheriff or by the Company, based on the findings of the final audit.

6. Payment shall be accepted by the Company on a monthly basis, based on Voluntary Audits as submitted by the Sheriff, using the monthly rates as scheduled in the Policy.

OPTION C - ANNUAL PAYMENT - COVERAGE FOR ALL EMPLOYEES

1. In lieu of the above, it may be the option of the Sheriff to pay an estimated annual premium using rates in the Policy, subject to an audit at the end of the period.

OPTION A _____

OPTION B _____

OPTION C _____

ACCEPTED BY:

SHERIFF

PARISH OF _____

DATE: _____